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## SECESSION, REFERENDUM AND LEGITIMACY OF A BALLOT TEXT – SCHOLARLY REFLECTION<sup>1</sup>

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### ABSTRACT

After the 1980 and 1995 sovereignty referendums in Quebec, relevant international institutions and liberal democratic states involved in secessionist struggles of their peripheries and scholars started to pay attention to the issue of wording of ballot formulas designed for independence referendums. In this text, the rather underestimated scholarly reflection of the issue will be critically scrutinized. Scholars have investigated on many aspects of the ballot text. Nevertheless, I argue that the whole debate on its legitimacy can be narrowed to three most relevant legitimizing criteria. Naturally, referendum questions ought to be an important part of scholarly attention, nevertheless, the relevance of response options cannot be underestimated. Last but not least, attention was paid to the question whether single-question ballot texts deserve more legitimacy than multiple-choice ballot texts. I found out that there was a dynamic development of the issue within the last two decades. As for intelligibility of the referendum questions, scholars have defined a clear question in opposition to unbearably long and biased formulas. As for fair response options, it has not been clear whether, in future, the most common Yes-No binary alternatives might be substituted by long and illustrative response options as it was the case on the ballot text designed for “Brexit”. Finally, scholars have not brought a clear answer to the question whether a single issue – which oversimplifies the issue – or a multiple-choice ballot text – which rarely generates clear majority for any of the alternatives – fulfils better the criteria of legitimacy.

**Key words:** secession, legitimacy, referendum, referendum question, response option, wording of the formula, ballot text, multiple-choice ballot

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## Introduction

This text focuses on the scholarly debate aimed at a partial issue related to the legitimacy of a referendum – wording of formulas on the ballot designed for independence referendums. This issue has either been ignored or strongly underestimated in the scholarly debate. The major goal of this text is to fill the gap in the scholarly research.

The paper proceeds as follows: first, principles of legitimate referendums and, mainly, independence referendums are reconsidered. Next, the legitimacy of the ballot text for independence referendums is investigated. Subsequently, the text is further divided into three sections devoted to – as the author argues – most relevant principles that should be taken into consideration when the legitimacy of the ballot text linked to independence referendum is scrutinised. These are intelligibility of the question formula, fair response options, and finally, the legitimacy of a single issue over multiple-choice options on the ballot text.

In the text, I use the term ballot text rather than referendum question. The term referendum question I apply for the first part of the formula on the ballot, (e. g. “Do you...”), while the response option is related to the answering part on the ballot (e.g. Yes/No).

## 1 Referendum and Legitimacy

In the last decades, the referendum device started to be used more frequently across the globe. (Aguiar-Conraria, Magalhães, 2010) In established democracies, political elites attempted to overcome the raising democratic deficit through the referendum device. In the post-communist world, referendums also became popular among the *demos*. Since 1990, scholars, international organisations, agencies, independent state bodies and political elites started to be focused on the good practice of referendums. (Reidy, Suiter, 2015, p. 159)

However, scholars are not united in their opinion on legitimacy of the referendum device. One group of them rejects it, while the other one advocates it and, finally, there are some academics undecided on the issue whether referendum is good or bad for democracy. (Gallagher, 1996, p. 244; Qvortrup, 2014, p. 48; Walker, 2003, p. 118) Many researchers hold negative attitudes towards application of the referendum device in democratic societies. (Duchacek, 1975, p. 47; Buchanan, 1991, p. 337; Setälä, 1999, p. 81) They prefer representative democracy over the direct one.

Scholars raised many arguments from the liberal-democratic positions against the referendum device. (Setälä, 1999, p. 3; He, 2002, p. 68; Butler, Ranney, 1994, p. 17) For example, **Maria Setälä** describes referendum as “an instrument in **Schumpeter’s** competition of elites or political parties (...) for consolidation of its position” (Setälä, 1999, p. 89) and voting is primarily aimed at strengthening “confidence in political leaders even when their formal reasoning is some policy issue.” (Setälä, 1999, p. 69) **Mark Clarence Walker** points at its manipulative tendencies “through emotion, populism, and extremism.” (Walker, 2003, p. 124)

On the contrary, some scholars suggest that proper employment of the referendum constitutes an indivisible part of liberal democratic institutions. For example, **Pier Vincenzo Uleri** defends direct democracy, which has become “an important part of the political process” (Uleri, 1996, p. 1) applicable both in the democratic and non-democratic world (Setälä, 1999, p. 1) and **Boagang He** considers referendum “the only satisfactory method by which the will of the people can be ascertained.” (He, 2002, p. 68)

## **2 Secession and Referendum – Evolution of Debate**

With regard to independence referendums, since the 1980s, the issue was only partly reflected within the wider framework of normative theories of secession – remedialists, national self-determination theorists and representatives of democratic theories. Finally, in the first decade of the new millennium, non-normative academics and experts working for international bodies like the Venice Commission of the Council of Europe and NGOs like the IDEA also contributed to the discussion on the principles of a legitimate referendum although their work was primarily not aimed at the independence referendum.

Unless a secession is negotiated between the central government and the legitimate seceding group, remedialists would rather disregard the use of referendums on the changes of boundaries and citizenship. (Buchanan, 2003, p. 245) Some sceptics towards the idea of an independence referendum pointed to the threat of blackmail potential of the secessionist groups. (Duchacek, 1975, p. 47; Buchanan, 1991, p. 337) They assumed that, in the contemporary era, it is not a rare strategy by the regional political elites not considering secession a serious political option. Their attempt to secede can be

motivated by the perspective of achieving economic advantages. (Philpott, 2003, p. 95) **Wayne Norman** calls it vanity secession. (Norman, 2003, p. 55)

On the contrary, **David Miller**, advocate of national self-determination theories, conditioned the idea of a legitimate referendum by the adequate identification of the secessionist group with the land it occupied. (Miller, 2003, p. 64) **Margaret Moore**, another scholar from the rank of theories of national self-determination, also links the right to secede to national identity but further claims that secession could be justified only in the case if a fair and free referendum, a qualified majority, and a clearly defined referendum question follow it. (Moore, 2004, p. 216)

Nevertheless, only scholars from the rank of democratic theories of secession rather unambiguously supported the referendum device for voting on independence. Unlike remedialists, they clearly condemned the idea that the central state authority should have the right to create principal procedural hurdles for a potential secession. (Wellman, 2005, p. 62) Unlike national self-determination theorists, they condemned the condition of national identity for a group entitled with the right to secede. They discussed a set of issues regarding a legitimate referendum – constitutional right to secession (and to a referendum); right to organise an independence referendum unilaterally; right of sub-regions to vote on secession from the secessionist entity; (Beran, 2005, p. 35, 39; Philpott, 1995, p. 380) turnout and approval quorums; (Philpott, 1995, p. 363; Wellman, 2005, p. 63; Copp, 1998, p. 220) double referendum perspective – initiatory and ratificatory; (Philpott, 2003, p. 97) the question of size and character of a group which can be a candidate to an independence referendum (Beran, 1984, p. 30; 2005, p. 36–40; Philpott, 1995, p. 365; Wellman, 1995, p. 2; 2005, p. 61) and, finally, the issue of a clear referendum question was also under scrutiny. (Philpott, 2003, p. 97)

At the turn of the millennium, discussion on legitimacy of independence referendums started to be surveyed by scholars not strictly belonging to above-mentioned theoretical streams – remedialists, national self-determination theorists and democratic theories. However, the subsequent debate was strongly fragmented. In particular, three groups of scholars could be identified.

First, there were scholars focused on a single case studies where the Quebec case significantly dominated. (Globus, 1996; Turcote, 1996; Howe, 1998; Walters, 1999; Lublin, Voss, 2002; Mendelsohn, 2003; Pammatt, LeDuc, 2001; Yale, Durand, 2011; Moore, 2004; Dodge, 1999; Pue, 2012) Second,

some academics aimed at partial issues only. For example, **Theresa Reidy** and **Jane Suiter** defined a list of referendum campaign regulation index components, (Reidy, Suiter, 2015), **Luís Aguiar-Conraria** and **Pedro C. Magalhães** tested legitimacy of approval and turnout quorum in referendum rules (Aguiar-Conraria, Magalhães, 2010) and **Simon Hug** and **George Tsebelis** analysed who asks the question and who triggers the referendum. (Hug, Tsebelis, 2002) **Baogang He** suggested a legitimacy index by exploring partial issues using a quantitative approach. (He, 2002, 77–79)

Third, **Matt Qvortrup** and **İlker Gökhan Şen** introduced a set of criteria for judging legitimacy of sovereignty referendums.

**Matt Qvortrup** introduced the following administrative criteria: (1) electoral commission to be established from the members of neutral institutions; (2) public broadcasting to be equal for both sides 50:50; (3) no public funds in a just campaign; (4) grants from the government allocated equally to both sides; (5) transparency on expenditures; (6) displaced voters and voters in the diaspora ought to have a right to vote; (7) no special majority requirements are necessary (50 % plus one vote is sufficient). (Qvortrup, 2014, 137–138)

**İlker Gökhan Şen** counted the following aspects of the referendum administration as “vital conditions for the legitimacy and future viability of a referendum and its results”: (Şen, 2015, p. 209) census; voters registration; freedoms of speech, assembly and right to vote; counting of votes; results declaration; management of legal disputes resolution; administration of the referendum area before and after the referendum. Additionally, he pointed to the relevance of other aspects of referendum, such as a qualified majority, a minimum turnout and turnout of approval, voter qualification including special cases as non-native residence, designation of voting units and, finally, formulating the referendum question. (Şen, 2015, p. 232, 255) A number of items could be taken into consideration when investigating the legitimacy of referendums. They can be summarised in the table below:

<b>Independence referendums &amp; quest for legitimacy</b>		
<b>Item</b>	<b>legitimate criteria</b>	<b>Examples</b>
Border	<b>uti possidetis regionalisation of uti possidetis</b>	colonial and post-colonial world republican and regional level
Electorate	<b>residents only residents and diaspora</b>	Scotland South Sudan
group	<b>injustice in the past</b>	remedial theories
	<b>national identity</b>	national self-determination theories
	<b>territorially concentrated</b>	democratic theories
constitutional right to secede	<b>part of the constitution</b>	Ethiopia
	<b>ad hoc (negotiated secession)</b>	Great Britain
	<b>post-colonial remedy, int. supervised</b>	Eritrea, East Timor
competencies	<b>central state institutions</b>	Ethiopia
	<b>deliberative</b>	The UK vs. Scotland
	<b>unilateral (legally / illegally)</b>	Nevis / Quebec
electoral body	<b>central state institutions</b>	Canada
	<b>independent electoral body</b>	Great Britain
majority requirements	<b>turnout quorum</b>	Nevis, Palau
	<b>approval quorum</b>	Canada
	<b>turnout approval q. combined</b>	Montenegro
Campaign	<b>just allocation of sources</b>	Great Britain
	<b>two umbrella organisations balanced media network</b>	
ballot text	<b>clear and unambiguous question</b>	Canada
	<b>intelligible question</b>	Great Britain

Source: Author.

### 3 Relevance of a Ballot Text

As for a clear ballot text, there is no consensus among academics focusing on the legitimacy of referendums whether it is important or not. In short, there are two divergent opinions – the first group of scholars is of the opinion that a ballot text cannot be regarded as an important factor.

For example, **Matt Qvortrup** states “that the wording of the question was of little importance.” (Qvortrup, 2014a, p. 63) **Qvortrup** argues that there is no “evidence from qualitative or quantitative research that suggests that the question mattered” (Qvortrup, 2014a) as the cases of negative language on ballots during referendums on separation in East Timor (1993) or secession in Sudan failed to prove the thesis on relevance of a biased ballot text. In both cases, voters voted overwhelmingly for independence irrespectively of the fact that the word independence on the ballots was substituted by deterrent terms “separation” and “secession” respectively. **Qvortrup** advocates a short and clear ballot text but it can be fully justified only in relation to the exact formula, which should be publicly known for a longer time ahead of the referendum date. (Qvortrup, 2014, p. 142) It means that for some scholars a fair campaigning is a crucial factor of any referendum. (IDEA, 2008, p. 56)

Supporters of a rational choice theory as well judge the referendum question as unimportant. They argue that voters are motivated solely by calculations based on perspective of economic costs or benefits. (Mendelsohn, 2003, p. 517)

On the contrary, a significant number of scholars are convinced that the question formula is an important issue. **Matthew Mendelsohn** argues that a ballot text is “one of the key elements of mobilization.” (Mendelsohn, 2003, p. 514) He assumes that “there can be little doubt that the wording of the referendum question matters.” (Mendelsohn, 2003, p. 525) The IDEA stated that “the wording of the question can have an important effect on the result and on its legitimacy”. (IDEA, 2008, p. 54) Scholars who participated in the crucial text of the Venice Commission on a good referendum argued that “the clarity of the question is a crucial aspect of voters’ freedom to form an opinion.” (Venice Commission, 2007, p. 17) Last but not least, **İlker Gökhan Şen** emphasized that “the issue of formulation of the ballot question (...) is of crucial importance in ensuring a legitimate and credible referendum.” (Şen, 2015, p. 5)

Outcomes of several practical surveys sufficiently proved that the referendum formula really matters. For example, prior to the vote on Scottish

independence, Lord Ashcroft confronted the voters in his survey with three different versions of the ballot text. The outcomes varied significantly (Lord Ashcroft Polls, 2012) and proved the original assumption that final results depended on the way how people were asked. (Lord Ashcroft Polls, 2012a) The intensive work of the Electoral Commission on designing the formula for independence referendums in Scotland and the “Brexit” could serve as another example confirming the thesis about the relevance of the ballot text. Interviewers in the surveyed focus groups also reacted differently to various versions of the formula on the ballot text. (The Electoral Commission, 2013, p. 9–18; 2013a, 11–21)

## 4 Reconsidering Legitimate Criteria

Among very few scholars who introduced the criteria for a legitimate ballot text, **İlker Gökhan Şen**, a Turkish academic, and the IDEA, a non-governmental organisation based in Stockholm, can be taken into consideration on that issue. In this chapter, these two initiatives will be reflected, critically analysed and – after a necessary reasoning – modified for the purpose of this text.

**İlker Gökhan Şen** formulated three aspects of a legitimate ballot text. First, the wording of the ballot text should be clear and free of ambiguity, second, votes should only be presented with one option, and third, a ballot should not be designed to support the status quo option. (Şen, 2015, p. 256)

In parallel, experts from the IDEA introduced three fundamental pillars related to a ballot text for a referendum. First, the question of responsibility for a ballot text (IDEA, 2008, p. 55) – its final design, submitting to voters, interpretation of the results and possibility of appeal against the way it was designed must be also guaranteed. (IDEA, 2008) Second, condition of a ballot text that would be as precise and clear as possible. The formula should not be vague and offering different interpretations. On the contrary, “it should be neutrally formulated and avoid expressions with any evident positive or negative overtone“ (IDEA, 2008, p. 54–55) while focused on one goal and interpretation only. (IDEA, 2008) Thirdly, the IDEA experts prioritise one single issue on the ballot text over the multiple choice version, however, if necessary, the latter option is not excluded but the ballot must be carefully designed for that purpose. (IDEA, 2008, p. 54)

In this text, I combined – though merged and modified – criteria introduced by **İlker Gökhan Şen** and the IDEA. There can hardly be any doubt about the

first principle introduced by Şen that the ballot text shall be “clear and free of ambiguity”. However, I argue that his second and third principles shall be reformulated. Regarding Şen’s second point, in my opinion – and in compliance with the IDEA experts – his argument aimed at pointing to voters who “should not be forced to vote for more than one option” (Şen, 2015, p. 256) may be justifiable only partly. A ballot designed with more than two options cannot be excluded from the quest for legitimacy *per se*. In addition, his third crucial condition emphasising the necessity of avoiding “maintenance of status quo” (Şen, 2015) also deserves modification. On the contrary, I argue that it would be more precise to focus the critical analysis on accuracy of the Yes/No binary response options on the ballot text where “No” is usually identified with status quo. Moreover, apart from the referendum question part of the formula, only a dedicated analysis of the Yes/No response options can bring more light to the relevance of the second – so far underestimated in scholarly investigation – part of the ballot formula. Finally, I agree that the institutional and legal framework cannot be underestimated. It is of crucial importance who has the right to design and submit a ballot text, but investigation of this issue would go beyond the scope of the aim of this article.

In sum, in the following passage of the text, the scholarly debate on the referendum would be reduced on three relevant issues:

- (1) A principle of a clear and unambiguous ballot text. *What are the voters voting on?*
- (2) A principle of a proper response option. *Avoiding the status quo maintenance and the problem of “Yes” and “No” answering options.*
- (3) One option only or a multiple choice ballot text. *Impact of the reduction effect if only one question is put on ballot.*

## **5 Clear and Unambiguous Formula**

The following part of the text is aimed at the scholarly contributions to the issue of a clear and ambiguous referendum question. The first group of scholars focused on the analysis of a long and biased ballot text in the Quebec referendums while the second group contributed to the final formula of the ballot text submitted to the voters in the Scottish independence referendum. In the meantime, some theoretical works appeared on other formulas related to independence referendums.

## 5.1 Quebec

As for the 1980 and 1995 Quebec cases, there were many scholars criticising the ballot texts formulated purely by secessionists. Most of the criticism was aimed at, first, the length of the question and, second, at the series of misleading terms on the ballot text – “sovereignty”, “sovereignty-association”, “formal offer to Canada...” and “...For a new economic and political partnership...” were critically scrutinised by scholars.

**Paul Globus** claimed that an “obvious problem is the excessive length [of the question]” (Globus, 1996, p. 149) while a clear ballot text should be more concise. (Globus, 1996) Similarly, Tom Flanagan stated that the formula on the ballot in the Quebec referendums of 1980 and 1995 could never qualify as a clear questions. In principle, it corresponds to the definition of “questions that were long, convoluted and probably not fully understood by large numbers of voters.” (Flanagan, 2011)

The 1980 and 1995 referendum ballots in Quebec were prepared by separatists in a way to achieve support of the largest possible part of the electorate. In 1980, Quebec separatists designed a “winning question” for the referendum as a “product of an extensive public opinion polling.” (LeDuc, no date, p. 19) In 1995, secessionists organised a referendum on a strategic decision but submitted an ambiguous question to voters – the word “independence” on the ballot was replaced by a less controversial word “sovereign”. Quebec secessionists adjusted their strategy to polls, which suggested that more voters would prefer “Yes” if there is the term “sovereignty” rather than “independence” on the referendum ballot. (Moore, 2004, p. 216)

Nevertheless, scholars strongly criticised that strategy for its manipulative character. In other words, **Paul Globus** pointed to the difficulties with the sovereignty on the ballot as follows:

“...does sovereign mean Quebec’s complete detachment from Canada or simply more autonomy for our democratically elected or self-appointed ‘sovereigns’ to make their own rules? If it means more autonomy to make our own rules, what does autonomy mean in this context and what rules are we referring to?” (Globus, 1996)

In particular, **Globus** condemned that the majority of voters voted for independence as “some 15% of the “Yes” voters believed they were voting for changes” (Globus, 1996) but only within the framework of the Canadian

federalism, not for a complete separation. Some of the citizens voting “Yes” believed in the perspective of a renewed federalism.

Similarly, **David Lublin** and **D. Stephen Voss** pointed to the fact that referendum “dealt with sovereignty directly, even if voters did not always understand precisely in what manner.” (Lublin, Voss, 2002, p. 79) Particularly, as Paul Howe stated, “it is well established that supporters of sovereignty, on a simple Yes/No question, differ considerably in the intensity of their sovereigntist yearnings. Some apparent sovereigntists would actually prefer that Quebec remain part of Canada with some sort of enhanced status and power.” (Howe, 1998, p. 34) In a more detailed way, **Pinard** and **Hamilton** were convinced that “many vote ‘Yes’ despite their lack of support for sovereignty, some out of ‘confusion’, others doing so tactically to force the rest of Canada to negotiate renewed federalism.” (in: Mendelsohn, 2003, p. 514–515)

In the late 1990s, after the ruling of the Supreme Court of Canada mentioned also a principle of a clear question, **Stéphane Dion**, a political scientist and minister of Intergovernmental Affairs of the Canadian federal government, influenced the debate on the issue of a clear question in his third open letter to the Prime Minister of Quebec, Lucien Bouchard, as follows: (Dion, 1998)

“The Government of Canada could never undertake negotiations on secession based on a question addressing such vague concepts as ‘sovereignty-association’ or ‘sovereignty within offer of political and economic partnership’. The risk of misinterpreting the vote would be too great, as many polls demonstrate.”

Apart from the vague term “sovereignty”, other passages of the ballot texts were criticised by scholars. For example, **Paul Globus** found formulas such as “formal offer to Canada...” and “...For a new economic and political partnership...” misleading and not clear enough. Globus further criticised the most controversial passages of the question claiming that voters could have a problem delimiting the borders of what is at stake at all. It is not clear whether the phrase “Do you agree that Quebec should become sovereign” refers to the official Province of Quebec or if there is an intention of the secessionists to revise the contemporary borders? Additionally, expressions like “formal offer” and “new economic and political partnership” made voters believe that the politicians in Quebec promised to cooperate with Ottawa on making significant changes while perceiving complete separation as last resort only. (Globus, 1996, p. 150)

After the Supreme Court findings revealed that a unilateral secession of Quebec from Canada could be a legal act, the Clarity Act identifying also a clear question was approved by the Canadian parliament. **Tom Flanagan** assumed that “the question, according to the act, must amount to ‘separation, yes or no?’ It can’t involve additional and confusing conditions about a mandate to negotiate or to enter into a new relationship with Canada.” (Flanagan, 2011)

## 5.2. After Quebec, Before Scotland

Prior to the Scottish independence referendum, there had been many other occasions to investigate the theoretical aspects of a precise ballot text in the post-Quebec era. In this chapter, the findings of the experts from the Venice Commission of the Council of Europe and from the IDEA will be scrutinised (although their focus was primarily not aimed at independence referendums). With regard to the prepared referendum in Montenegro, scholars Anthony Bradley, Carlos Closa Montero and Kaarlo Tuori identified a legitimate ballot text in the framework of the Venice Commission of the Council of Europe in 2001 under the following conditions: clear (not obscure or ambiguous); not misleading; not suggesting an answer; informed electorate; and finally, response options must be “yes, no or a blank vote.” (Venice Commission, 2005, p. 6) They also recognised the proposed formula of the question for the Montenegrin independence referendum, which reads:

“Do you want the Republic of Montenegro to be an independent state with full international and legal personality?” as the one which “would have fulfilled the requirements relating to the question.” (Venice Commission, 2005)

In 2007, the Venice Commission issued a document based on the expertise written by **Pieter van Dijk**, **François Luchaire** and **Giorgio Malinverni** titled the “Code of Good Practice on Referendums.” The text clarified that a referendum text “must not ask an open question necessitating a more detailed answer.” (Venice Commission, 2007, p. 17) Experts also suggested that a referendum formula can start by using personal and not neutral “Are you in favour...?” (Venice Commission, 2005, p. 19)

In 2008, the experts from IDEA published an expertise focused on direct democracy where reasoning about legitimacy of a ballot text constituted a substantial part. As for a clear question principle, the IDEA suggested that it “should be as precise and clear as possible and should have one goal and interpretation only. It should not be vague or capable of different meanings. It

should be neutrally formulated and avoid expressions with any evident positive or negative overtone. In the abstract, this may seem to be straightforward and self-evident, but in practice, it may be less easy to achieve. Malpractices such as double negatives and biased language abound.” (IDEA, 2008, p. 54–55)

### 5.3. Scotland

During the referendum on independent Scotland, scholarly contribution on the wording of the ballot text was quite intensive. A proper ballot text was designed by a comprehensive effort of the executive and legislative bodies of the UK and Scotland, the Electoral Commission, focus groups and experts invited for consultations.

As a consequence of sharp criticism formulated by the British executive, the Scottish government definitely abandoned its intention to present a multiple ballot text for an independence referendum and suggested the following formula: “Do you agree that Scotland should be an independent country?” Yes/No to discussion. (The Scottish Government, 2012, p. 11) Due to the initiative of the Electoral Commission, separate parts of the formula as “Do you agree”, “be”, “independent” and “country” were comprehensively scrutinised by focus groups and experts.

As for the initial part “Do you agree...”, Stephen Tierney pointed to the advisory opinion of the Venice Commission’s Code of Good Practice on Referendums which lacked any sign of criticism towards the formula ‘Do you agree’ on the ballot paper and to an example of a legitimate ballot text suggested by the Venice Commission: “Are you in favour [‘of amending the Constitution to introduce a presidential system of government?’].” (The Electoral Commission, 2013, p. 20)

The Electoral Commission found no reason to dispute the word “Scotland” on the ballot text. Virtually, there could only be doubt what seceding part from the mother state exactly means “territorially”. For example, **Allen Buchanan** doubts whether *uti possidetis* rationale is a proper solution because it was originally applied to the decolonisation of Latin America, later in Africa to limit fragmentation and recently in ex-Yugoslavia and Quebec – in case of their secessions. (Buchanan, 2003, 250–253)

**Adam Tomkins** called for using the term “become” instead of the term “be” for the reason that the formula should ask about what Scotland should become, not what Scotland is: “note also the verb: the question must make clear that

what is at stake is a change.” (The Electoral Commission, 2013, p. 28) Scholars’ views differed on the term “independent”. **Nicola McEwen** suggested a preamble on the ballot, which would clarify the term “independence.” (The Electoral Commission, 2013, p. 22) Other scholars, **James Gilmour** and **Stephen Tierney**, argued that the meaning of “independent” should be clarified to voters way ahead of the referendum. (The Electoral Commission, 2013) **Adam Tomkins** and **John Millar** raised doubts regarding the clearness of the understanding of “Scottish independence”. They suggested a formula, which would read “that Scotland would leave the UK.” (The Electoral Commission, 2013) As for “country”, **Adam Tomkins** rejected the usage of the wording “independent country” in the formula because Scotland is already independent in many ways. He suggested that the question cannot be linked to Scotland’s identity as a “country” but to a “statehood”, therefore the formula should read “should Scotland become an independent state?” (The Electoral Commission, 2013, p. 26) Some lawyers promoted the term “state” as the most suitable regarding the international relations. On the contrary, **Nicola McEwen** argued against replacing “country” by “state”. The term “state” has a formal legal status and meaning in international relations but it brings hardly any advantage when used on a referendum ballot. In particular, she warned that it “has little public resonance and may make the question difficult to understand for voters.” A similar view was held by **Tierney** for whom the “state” is suitable for teaching constitutional and international law, but it was apparently not the case suitable for a nationwide referendum in which people shall properly understand the term. For **Matt Qvortrup**, neither “country” nor “state” but the term “nation” would qualify best for Scotland as a new subject of international law. Finally, **McEwen** would avoid both “country” and “state” completely. She would suggest the final formula as follows: “Do you agree or disagree that Scotland should be independent?”(The Electoral Commission, 2013, p. 27)

To sum up, contrary to scholarly opinion, the final version of the ballot text was decided by the Electoral Commission on the grounds of research participants who commonly felt the formula “Do you agree...” as “to be biased towards a ‘Yes’ outcome and potentially leading people towards a ‘yes’ vote.” (The Electoral Commission, 2013, p. 1, p. 13) Therefore, the Electoral Commission recommended the phrase “Should...” and considered the term a “more neutral formulation because it encouraged and allowed them [voters] to give their [voters] own view rather than agree or disagree with someone else’s”. (The Electoral Commission, 2013, p. 14) As a consequence, the Electoral

Commission rejected the originally suggested phrase “Do you agree” for being too personal, imbalanced and not neutral enough. In short, it allegedly instructed voters to side with the “Yes” option. Therefore, the submitted version was reformulated into the final one, which reads: “Do you agree that Scotland should be an independent country?”

## 6 Response Options

The last part of the ballot text designed for the independence referendum had until recently been an underestimated issue both in theory and practice. Before designing a referendum ballot for Scottish independence, Yes/No response options were considered as fully legitimate. Some of these formulas were approved as fair by experts from the international community.

According to Şen,

“a short question, set on a Yes/No basis, may often be considered appropriate as it provides brevity, simplicity and clarity. However, in some cases, such a framing reflects only the most extreme views and would thus be in violation of the rule of unity of content, potentially forcing those with ‘diametrically opposed views’ to vote the same way.” (Şen, 2015, p. 257)

However, there are several pieces of evidence that response options on the ballot matter and can influence results. For example, shortly after the Scottish government proposed the ballot text for the independence referendum in Scotland, Lord Ashcroft conducted a survey with a sample of over three thousand adults in Scotland. It surveyed the version submitted by the ruling SNP in Scotland (Q1) and two alternative hypothetical options on the ballot text (Q2, Q3):

	referendum question	response options	results
Q1	<i>Do you agree that Scotland should be an independent country?</i>	Yes No	41% 59%
Q2	<i>Do you agree or disagree that Scotland should be an independent country?</i>	Agree Disagree	39% 61%
Q3	<i>Should Scotland become an independent country, or should it remain part of the United Kingdom?</i>	<i>Become an independent country</i> <i>Remain part of the United Kingdom</i>	33% 67%

Source: Lord Ashcroft Polls, 2012.

Lord Ashcroft concluded that the results depend on the way you ask and that the ruling SNP in Scotland “have chosen the version of the question most likely to deliver the answer that would most please them.” (Lord Ashcroft Polls, 2012a)

In fact, binary response option based on Yes/No alternatives on a ballot are the most common answers on the ballots of independence referendums. For example, Yes/No response options were on the ballots for a series of referendums starting from the 1980 and 1995 referendums in Quebec, and later in Eritrea in 1993 and Montenegro in 2006, where – unlike in Quebec – the voting was supervised by the international community and recognised as fair.

Prior to the 2014 independence referendum in Scotland, the Electoral Commission rejected the suggestion of the academics consulted on the issue. **Lord Sutherland, Matt Qvortrup** and **Ron Gould** recommended that “Yes” and “No” response options on the ballot should have been replaced by less neutrally formulated answers “I agree” and “I do not agree” on the question “Should Scotland become an independent country?” (The Electoral Commission, 2013, p. 21)

Scholars and the supervising institutions left “Yes” and “No” answers on ballots for a long time intact. However, prior to the Scottish referendum, more scholars had warned that “Yes” and “No” response options are not free of ambiguity. For example, **Matt Qvortrup** claims, first, that the “Yes” option evokes more positive connotations to voters, while the “No” option on ballot could be rather negative. (Qvortrup, 2014, p. 132) Second, voters tend to vote “No” if they are confused and if they are confronted with a longer question. (Qvortrup, 2014, p. 142) Third, there are certain assumptions that “a biased and one-sided question can prompt the voters to vote yes to a question which they would have rejected – had they understood it.” (Qvortrup, 2014a, p. 62)

However, replacing the ballot text based on “Yes” or “No” options would not guarantee unambiguity of the response option on the referendum formula. Several examples from the past and other recent cases can prove that concern.

For example, in the case of the Faroe Islands independence referendum from Denmark in 1946, there were neither clear Yes/No response options on the ballot nor the term “independence”. Citizens opted either for “home rule” (“Danish proposal”) or for a “separation”. Subsequently, there was a problem of how to interpret the legitimacy of the results which brought only a narrow majority of 50,7% in favour of the separation and, mainly, over 4% of wasted votes, most likely because some voters disapproved of both home rule and separation.

In the Post-Cold war era, there were several cases of internationally supervised referendums where alternative response options replaced Yes/No on the ballot text. In the 1999 East Timor referendum, the formula on the ballot text was misbalanced as it privileged maintaining the status quo by promising “the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia” over the formula “Do you reject the proposed special autonomy for East Timor, leading to East Timor’s separation from Indonesia?” (Strating, 2016, p. 61) The ballot in South Sudan was unique as it offered its voters neither questions nor answers but only short options “Unity” or “Secession”, the latter term being associated with negative connotations. (Qvortrup, 2014a, p. 63) Particularly, “Unity” relates to positive concepts such as collectivism, family and strength, while the term “Secession” is linked to the image of balkanisation, (Philpott, 1995, p. 354) endless fragmentation (Buchanan, 1991, 338) and, as **Abraham Lincoln** claimed, secession would lead to anarchy at the end. (Lindsay, Wellman, 2003, p. 114) Moreover, fully accomplishing a “Secession” does not guarantee international recognition. (Wood, 1981, 111)

There may be cases – although very rare – of fabricated referendums (Leichtova, 2016, p. 307–309), in which ballot text do not offer a choice between change (“Yes”) and status quo (“No”), but there are two options of which none is based on the status quo, as this was the case of the 2014 Crimea referendum on either “reunification of the Crimea with Russia as a subject of the Russian Federation” or “the restoration of the Constitution of the Republic of Crimea as of 1992 status of the Crimea...” (Venice Commission, 2014, p. 2)

Finally, efforts to make the formula as much illustrative as possible, does not guarantee its clear and unambiguous interpretation. In the 2016 “Brexit” secessionist referendum, the response options on the ballot text were formulated in sentences such as “Remain a member of the European Union” or “Leave the European Union.” (The Electoral Commission, 2015, p. 40) Prior to the “Brexit” vote, the Electoral Commission accepted complaints of campaigners favouring exiting the EU when it recommended to amend “Yes” or “No” response options on the ballot at the expense of a more extensive formulation in order to achieve a more neutral formula. However, the Plain Language Commission, an expert body independent of the UK government, argued that ballot text is clear and disagreed with the proposals of the Electoral Commission to substitute the response options based on Yes/No options with a much longer response options reasoning that “the repetition of ‘European Union’ and the

inclusion of the two answers makes it wordy.” (The Electoral Commission, 2013a, 20–21) Moreover, the Plain Language Commission found “potential difficulties” in the way the two counter-campaigns could reflect that part of the formula. While the “Yes” and “No” campaign is clear, it is not sure how the two camps can use the words “Remain” and “Leave” in their campaigns and what could be the effect of these campaigns on voters. “‘Vote yes’ and ‘vote no’ are more speakable and memorable to voters than ‘vote remain’, and ‘vote leave.’” (The Electoral Commission, 2013a)

## 7 One issue or multiple choice?

It is also questionable whether a legitimate ballot text for an independence referendum should be reduced to one single issue or if multiple choice ballot with more than one item can be fair.

By definition, the term referendum can be perceived exclusively in both meanings outlined above. First, referendum is “a general vote by the electorate on a single political question which has been referred to them for a direct decision.” (Oxford dictionaries, no date) Second, a voting where voters have “the possibility to vote for or against a specific proposal” means that in “some cases voters have been given a choice between three alternatives...” (IDEA, 2008, p. 54)

Experts from the IDEA and **İlker Gökhan Şen** prefer ballot texts with only one single question, nevertheless, it does not exclude that the formula must be determined by a single issue.

In the case of a multiple choice, the IDEA stressed that a ballot formula must be carefully constructed if more alternatives can be applied: (IDEA, 2008)

“However, if a choice between more than two alternatives is really wanted, a vote where the alternatives are rank-ordered could be applied, or the issues could be split up into two or more questions – each of them with two alternatives.”

Similarly, **İlker Gökhan Şen** prioritises voting on one issue, which would be included in a single question. (Şen, 2015, p. 256) He argues that the disadvantage of a multiple referendum ballot is in its tendency to privilege the status quo, therefore the “No” preferences always win over the “divided ‘Yes’ votes, and thus the status quo wins” (Şen, 2015) because “the anti-status quo votes are divided.” (Şen, 2015) However, **Şen** does not rule out a multiple choice referendum but he suggests strict rules to be imposed on such voting.

First, voters shall decide between a status quo and a change and then – in case of success of the anti-status quo options – finally, voters would decide on alternatives in a second round of ticking or voting respectively. (PR51ST, no date)

As the best option, **İlker Gökhan Şen** suggested using another method of voting in which two referendums would be held. In the first referendum, voters would decide between a status quo and a change, and then, the second, more concrete referendum would be held, but only in case the latter option was preferred by the voters. (Şen, 2015, p. 266)

The third scenario – outvoting the least popular option in the first referendum – was conducted in the Newfoundland sovereignty referendum in 1948. Altogether three questions were put on ballot in this referendum on sovereignty. Two options designed on the ballot were pro-British (responsible government) and anti-confederative (commission rule). The third option was the confederative one aimed at joining Canada. However, the results of the first round of the referendum were not persuasive enough. After the first round of voting, the option promoting the commission rule was withdrawn, as it enjoyed only 14% of support. The most popular choice in the first round, responsible government, which was favoured by 45% of the voters, was tightly outvoted (48:52) in the second round by the accession to Canada. (Setälä, 1999, p. 29) However, the final numbers revealed that the second round of voting was not sufficiently conclusive either.

Apart from ballot design, the campaign before a multiple choice referendum must be seriously taken into consideration, as it can generate both positive and negative consequences. As for the advantages, as the IDEA experts state, “the voters are involved more efficiently in the decision making on a wider range of public affairs, which may increase democratic legitimacy and responsiveness.” (IDEA, 2008, p. 54) As for possible negative consequences, the IDEA warns about the fact that (IDEA, 2008):

“the voters have to inform themselves on a large number of issues which may not be related to each other. Obtaining sufficient information for deciding how to vote on so many issues is both time-consuming and intellectually demanding. Public debate cannot penetrate deeply into all subjects, the campaign tends to be less focused, and the voters may become dependent on the advice given by political parties, interest organizations or ad hoc campaign groups. If votes on several issues at the same time result in less informed

decisions, confusion among the voters and a resulting low turnout, the democratic legitimacy of the referendum results is undermined.”

After the multiple choice referendum, “it may be difficult to interpret the referendum result.” (IDEA, 2008) It could be difficult to gain support of the legitimate majority for any of the intended options. A ballot designed with a multiple choice question would decrease the number of voters opting for any of the options offered on the ballot. The question is what number can sufficiently legitimise such a crucial event as the secession from the mother state? In any referendum based on a multiple choice ballot it is almost impossible to achieve absolute majority. Voters usually split their preferences into more options and none of them gains a sufficient majority. Only the referendum with two alternatives on the ballot brings the clearest results. At least arithmetically. In practise, it has also negative side effect.

However, if the ballot is reduced to one issue only where “only one question is usually asked per measure,” (Walker, 2003, p. 125) and multiple choice is left out, another serious problems can arise – there is no way of finding a reasonable compromise between the two fundamental response options aimed either at the continuing unity or at secession. The results can be frustrating for many citizens, especially should their defeat be tight, and trigger a deep polarisation of the society. (Setälä, 1999, p. 29) As a consequence, it can create or deepen cleavages on several conflicting lines such as national majority – ethnic minority, young – old, educated – less educated, wealthy – poor or city – country. Opponents of the crucial decision taken by the – sometimes very tiny – majority could be, as Walker said, “unsatisfied and sometimes unwilling to comply over time.” (Walker, 2003, p. 127)

There have been many examples of independence referendums, which caused or deepened social divisions. Most likely, such a vote would contribute to a division of society along the ethnic lines as in Bosnia and Herzegovina. Independence referendums usually reveal disapproval, boycott or lower turnout of a significant minority residing in the country.

## **Conclusion**

There are many countries, which gained independence without prior referendums and did not lack legitimacy as such. Therefore, referendums on independence are not an absolute precondition of legitimacy but the frequent use of that device in the last decades encouraged scholars to elaborate its fairness.

The scholarly debate on the issue revealed, first, a dynamic development of the issue within the last two decades – mainly after the Quebec referendums and before the recent referendum in Scotland. Despite common progress towards intelligibility of a ballot text, there is still lack of consensus among academics and experts on the issue.

As for intelligibility of the referendum question, after both of the Quebec sovereignty referendum questions, scholars defined a clear question in opposing the side of an unbearably long and in many aspects biased formulas at first. They contributed to the issue by pointing at the vague term “sovereignty” that should have been replaced by “independence” and at the long, unnecessary and confusing formulas as “economic partnership” and “formal offer” on the ballot. From the early 1990s until the investigation of the intelligible referendum question in Scotland, many referendum questions on the ballot contained the phrase “*Do you...*” without being rejected by the experts or international community as biased. Elaboration of a fair question designed for the referendum on Scottish independence has changed it against the will of the scholarly opinion.

As for a fair response option, the “Brexit” referendum may change the course. However, it is far from certain whether long and illustrative response options on the “Brexit” ballot paper would mean a general shift from the traditional Yes/No alternatives on the referendum ballot which became biased, as the “Yes” is allegedly more attractive to voters. However, confusion around the “Brexit” results revealed that a strong tie between the formula on the ballot text and fair campaign is a necessary condition for a legitimate referendum.

Finally, as for the question whether a single issue or a multiple choice ballot text fulfils better the criteria of legitimacy, scholars did not bring a clear answer on the issue. They revealed a serious dilemma. If a single issue is prioritised on the ballot, the decision based on “Yes” or “No” options respectively oversimplifies the complex political reality and, at the same time, it could seriously split the society into two divergent blocks. If the multiple choice option is preferred, irrespective of its more pluralistic character, it may be difficult or impossible to receive a clear majority on the issue of secession, which can have fatal consequences on all generations living in both the seceding unit and the larger state and cannot be compared to FPTP voting or to regular referendums on ordinary questions.

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